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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Hon. Mary Ann Brigantti-Hughes

_____X

RATHA MAK

Decision and Order

Plaintiff,

-against-

Index No.: 15129/06

SILVERSTEIN PROPERTIES, INC., 120 BROADWAY HOLDINGS, LLC, PLATINUM MAINTENANCE SERVICES CORP., and BENJAMIN MAINTENANCE CORP.,

Defendants.

_____X

120 BROADWAY HOLDING, LLC,

Third-Party Plaintiff,

-against-

REMCO MAINTENANCE CORPORATION,

Third-Party Defendant.

_____X

120 BROADWAY HOLDING, LLC,

Second Third-Party Plaintiff,

-against-

STERLING SERVICES COMPANY,

Second Third-Party Defendant.

_____X

The following papers numbered 1 to 7 read on these motions noticed on January 20, 2010 and duly submitted on the Part IA15 Motion calendar of February 1, 2010:

Papers Submitted	Numbered
Def. 120 Broadway Holdings, LLC Motion & Exhibits	1-2

Pl. Ratha Mak Cross-Motion & Exhibits & Opposition	3-5
Def. 120 Broadway Holdings, LLC Opposition	6
Def. Silverstein Properties, Inc., Opposition	7

Upon the foregoing papers, Defendant/Third-Party Plaintiff, 120 Broadway Holdings, LLC, moves for an Order pursuant to CPLR §2001 and CPLR 5019, to Resettle the Court's October 7, 2009 Decision/Order to include a decisional paragraph dismissing the Plaintiff's common-law negligence claim as against Defendant 120 Broadway Holdings, LLC; and

Plaintiff, Ratha Mak cross-moves for an Order granting leave to Renew and/or Reargue the Court's Decision and Order dated October 7, 2009 on the grounds that the Court did not consider Plaintiff's Affirmation in Opposition dated July 6, 2009 submitted in reply to Defendant's Motion for Summary Judgment, and upon such Renewal and/or Reargument, deny the Defendant's motion that seeks a decretal paragraph dismissing Plaintiff's common-law negligence cause of action.

In the interest of judicial economy, the aforementioned Motion and Cross-Motion have been consolidated by the Court and are disposed of in the following Decision and Order.

I. Background and Procedural History

The herein action, arises from an accident that occurred on February 9, 2005, at approximately 9:00 p.m., while Plaintiff, Ratha Mak was performing his duties as a metal cleaner on behalf of his employer Remco Maintenance, LLC, ("Remco"). On the day of the accident Plaintiff was cleaning and polishing a revolving door that leads to an underground entrance of New York City's subway system. The revolving door is located in the lower level floor of a building on 120 Broadway, New York, New York. Defendant 120 Broadway Holdings, LLC ("120 Broadway") is the owner of the subject building. Silverstein Properties, Inc., ("Silverstein

Properties") was retained by 120 Broadway, pursuant to a property management agreement, to assume the contractual duty of maintaining and repairing the property on behalf of 120 Broadway.

At the time of the incident, Plaintiff was standing on an A-frame ladder, cleaning the drum of the revolving doors—a cylinder type structure in which the doors revolve. Upon touching the ceiling of the drum, a metal panel fell from the ceiling along with loose bricks. The bricks were positioned behind the metal panel. The metal panel and bricks struck plaintiff in the head and neck causing Plaintiff to fall off the ladder to the floor below.

As a result of the accident, Plaintiff sustained personal injuries and was taken to New York Downtown Hospital's Emergency Room where he received treatment on February 9, 2005 and was later discharged on February 10, 2005. Prior to the accident, Plaintiff had not, at any time, worked on the subject revolving door. Nor did Plaintiff know that bricks had been placed on top of the panel.

On May 10, 2006, Plaintiff commenced the instant action against 120 Broadway, Silverstein Properties, Platinum Maintenance Services Corp., and Benjamin Maintenance Corp. alleging, among other things, that the accident and injuries were caused solely by reason of the Defendants' negligence and that Defendants, by its agents, servants and/or employees were reckless, careless and negligent in the ownership, operation, maintenance and control of said premises and in failing to maintain the premises in a reasonably safe condition. Subsequently, Plaintiff served a verified Bill of Particulars Plaintiff specifying causes of action under Labor Law §§§ 200, 240(1), and 241(6) against the Defendants.

On September 18, 2006, Defendant 120 Broadway impleaded Third-Party Defendant

Remco alleging, among other things, that if Plaintiff sustained injuries as alleged they were caused and brought about solely by Remco's negligence and that pursuant to a written agreement, if Plaintiff recovers a judgment as against 120 Broadway, then 120 Broadway is entitled to recover against Remco as it agreed to indemnify and hold harmless 120 Broadway.

Similarly, on October 5, 2007, Defendant 120 Broadway impleaded Second Third-Party Defendant, Sterling Services Company alleging among other things that Plaintiff's injuries were due to Sterling Services' negligence and that in the event that Plaintiff recovers a judgment as against 120 Broadway, Sterling Services is liable pursuant to a written agreement to indemnify and hold harmless, Defendant/Third-Party Plaintiff, 120 Broadway.

Following discovery, Plaintiff voluntarily consented to discontinue its action against, Defendants, Platinum Maintenance Service Corp. and Benjamin Maintenance Corp., as Plaintiff could adduce no evidence demonstrating Defendants' involvement with Plaintiff's accident. Thus, the parties stipulated to Discontinuance with Prejudice as against Platinum Maintenance Service Corp. on August 7, 2008 and as against Benjamin Maintenance Corp., on October 14, 2008.

On February, 11, 2009 Defendant, 120 Broadway, moved for Summary Judgment seeking an Order to dismiss Plaintiff's Complaint and all Cross-Claims and Counter-Claims, with prejudice, on the grounds that no triable issues of fact existed with respect to 120 Broadway's negligence and an Order to dismiss Plaintiff's Labor Law causes of action under §§§200, 240(1), and 241(6) as well as an Order granting 120 Broadway Summary Judgment against Co-Defendant Silverstein Properties on its claims for contractual defense and indemnification, along with costs.

On April 21, 2009 Defendant, Silverstein Properties also moved for Summary Judgment seeking an Order dismissing Plaintiff's complaint and all cross-claims against it; and for an Order granting it contractual indemnification against Co-Defendant, 120 Broadway.

Plaintiff filed its Affirmation in Opposition to Defendants' motions for summary judgment on July 6, 2009 claiming that Defendants, 120 Broadway and Silverstein Properties were not entitled to summary judgment because they failed to establish as a matter of law that: 1) they maintained the property in question in a reasonably safe condition; 2) did not create the allegedly unsafe conditions that led to Plaintiff's injuries; 3) they did not have exclusive control of the operation of the building; and 4) they did not have actual or constructive notice of the unsafe condition that led to Plaintiff's injuries.

On October 7, 2009, the Court issued an Order that *inter alia*: 1) granted Defendant/Third-Party Plaintiff, 120 Broadway's motion for summary judgment as against Plaintiff and dismissed Plaintiff's Labor Law causes of action; 2) denied Defendant/Third-Party Plaintiff, 120 Broadway's motion for summary judgment as against Defendant, Silverstein Properties for contractual indemnification; 3) granted Defendant, Silverstein Properties' motion for summary judgment against Plaintiff and dismissed Plaintiff's Labor Law causes of action; 4) denied Defendant, Silverstein Properties' motion for summary judgment on its contractual indemnification claims against 120 Broadway; 5) granted Second Third-Party Defendant, Sterling Services' motion for summary judgment dismissing the Second Third-Party Complaint against it as it met its burden in establishing a lack of negligence and no evidence was adduced by 120 Broadway demonstrating Sterling Services' negligence; 6) granted, Third-Party Defendant, Remco's motion for summary judgment as to Defendant, Silverstein Properties and

dismissed Silverstein Properties' cross-claim for negligence against Remco as Silverstein Properties failed to raise a triable issue of fact with respect to Remco's negliegence.

A copy of the Court's Decision and Order with Notice of Entry was served on all the parties by mail on October 29, 2009. Thus, the timeframe for filing a motion for leave to reargue would have expired on December 3, 2009—thirty days after service of the Court's Order, as prescribed by CPLR §2221, plus the five days that accrues to the movant when service of the Order is executed by mail, as required by CPLR 2103(b)(2).

On November 2, 2009, 120 Broadway, Sterling Services, and Remco stipulated and agreed to discontinuance of 120 Broadway's Third-Party claims as against Remco as well as Sterling Services cross-claims against Remco, along with all cross-claims asserted by Remco. Thereafter, on November 10, 2009 Defendant, 120 Broadway filed a Notice of Appeal to the Appellate Division of the New York Supreme Court for the First Department for an appeal from this Court's October 7, 2009 Order.

Further, by Order to Show Cause, dated January 4, 2010 Defendant, 120 Broadway moved pursuant to CPLR §2001 and CPLR §5019 to resettle the Court's Decision and Order dated October 7, 2009, requesting that the Court include a decretal paragraph dismissing Plaintiff's common-law negligence claims. On January 18, 2010, by Notice of Cross-Motion, Plaintiff moved for an Order to Renew and/or Reargue the Court's October 7, 2009 Order, and upon such renewal and reconsideration, deny 120 Broadway's motions for summary judgment with respect to Plaintiff's common-law negligence cause of action. Affirmations in Opposition to Plaintiff's Cross-Motion were filed by Defendants, Silverstein Properties and 120 Broadway on January 19, 2010 and January 27, 2010, respectively.

For the reasons discussed more fully below, Defendant, 120 Broadway's Motion for Resettlement that seeks a decretal paragraph dismissing Plaintiff's common-law negligence cause of action is DENIED. Plaintiff's Cross-Motion for leave to Renew and/or Reargue the Court's Decision and Order dated October 7, 2009 is GRANTED.

II. Legal Standard of Review

A. Reargument

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979). A motion for leave to reargue "shall be identified specifically as such" [and] "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matter of fact not offered on the prior motion...." McKinney's CPLR 2221(d) (1) & (2); see also, *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984); see also, *De Blasio v. Volkswagen of America, Inc.*, 124 Misc.2d 726 (1984); *Flynn v. Town of North Hempstead*, 114 Misc.2d 12552 (1982), affirmed 97 A.D.2d 430. The motion is to be made within thirty days after service of a copy of the order determining the prior motion, together with written notice of entry. McKinney's CPLR 2221(d)(2) & (3).

B. Renewal

"An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking

leave to renew, and, therefore, not made known to the court." *Foley*, 68 A.D.2d at 568. A motion for leave to renew "shall be identified specifically as such" [and] shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion." McKinney's CPLR CPLR 2221(e) (1),(2), & (3). "A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence on the original motion." *Boudreau v. Broadway Houston Mack Development, LLC*, 21 Misc.3d 1131, 1135 (N.Y. 2008)

C. Resettlement

"Resettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court." *Foley v. Roche*, 68 A.D.2d 558, 565 (1st Dept. 1979); *Harbas v. Gilmore*, 214 A.D.2d 440 (1st Dept. 1995). "A motion for resettlement is designed not for substantive changes, but to correct errors of omissions in form, for clarification or to make the order conform more accurately to the decision. *Simon v. Mehryari*, 16 A.D.3d 664, 666 (2nd Dept. 2005).

IV. Discussion

A. 120 Broadway's Motion for Resettlement

Defendant, 120 Broadway seeks resettlement of the Court's October 7, 2009 Decision and Order on the grounds that the Court did not address Plaintiff's claim of common-law negligence. 120 Broadway asserts that given the Court's dismissal of Plaintiff's Labor Law §200 cause of action and the Court's acknowledgment that §200 is a codification of common-law negligence, the Court should correct its previous Decision and Order to include a specific paragraph dismissing Plaintiff's common law negligence claim as to Defendant 120 Broadway.

The Court agrees with Defendant, 120 Broadway's contention that Labor Law §200 is essentially a codification of common-law negligence principles concerning the duty imposed upon an owner or general contractor to provide workers with a safe work environment. See, *Comes v. New York State Elec. & Gas Corp.*, 82 NY.2d 876, 877 (1993); *Ross v Curtis-Palmer Hydro-Electric Company et al.*, 81 N.Y.2d 494, 505 (1993); *Dunham v. Hilco Construction Co.*, et al., 89 N.Y.2d 425, 429 (1996). It is well settled that an implicit precondition to this duty is that the party charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition See *Rizzuto v. LA. Wenger Contracting Co., Inc.*, 91 NY.2d 343, 352 (1998). Thus, the statute is applicable only to those owners and contractors who exercise control or supervision over the work being performed, or who have either created a dangerous condition or had actual or constructive notice of such condition. See *Lombardi v. Stout*, 80 N.Y.2d 290, 294-95 (1992)

In the instant case, Defendant, 120 Broadway made a prima facie showing of entitlement to summary judgment dismissing the causes of action alleging violations of Labor Law §200 and common-law negligence by demonstrating that it did not exercise supervisory control over Mr.

Mak's work, and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition. Indeed, the undisputed facts show that 120 Broadway was not involved in the day-to-day operations of the building nor did Plaintiff have any knowledge of 120 Broadway or encountered any of its employees. Thus, Defendant, 120 Broadway correctly asserts that it was entitled to summary judgment, as a matter of law, on Plaintiff's causes of action under Labor Law § 200 and common-law negligence. However, because resettlement may not be used to effect a substantive change or to amplify the prior decision of the court, See *Foley*, 68 A.D.2d at 565, and for the reasons more fully developed in the paragraphs that follow, the Court will deny 120 Broadway's motion for resettlement and will grant Plaintiff's motion for leave to reargue the Court's October 7, 2009 Order.

B. Plaintiff's Cross-Motion

Plaintiff seeks leave of this Court to reargue and or renew Defendants' prior motion for summary judgment on the purported ground that the Court overlooked its opposition papers dated July 6, 2009 opposing Defendants' motions for summary judgment. At the outset the Court notes that Defendants' motions for summary judgment were not ruled upon as unopposed. The Court's error in omitting Plaintiff's papers from the cover list to its October 7, 2009 Decision/Order does not stem from a conclusion that Plaintiff did not wish to challenge Defendants' motions and should not be construed as such. Had the Court deemed Defendants' motions as unopposed it would have explicitly indicated such by discussing Plaintiff's failure to contest the motion in its Decision/Order.

i. Timeliness of the Reargument Branch of Plaintiff's Motion

With respect to Plaintiff's motion to reargue, the Court notes that Plaintiff's motion is untimely as is proscribed by CPLR § 2221. All parties to the action were served a copy of the Court's Decision and Order with Notice of Entry by mail on October 29, 2009. Thus, Plaintiff had until December 3, 2009 to move for leave to reargue. Plaintiff's motion was made on January 18, 2010—more than thirty days after service upon him of a copy of the Order entered on November 2, 2009, as required by CPLR §2221, plus the additional five days added to this time period pursuant to CPLR 2103(b)(2). See *Selletti v. Liotti*, 45 A.D.3d 668, 669; (2nd Dept. 2007) (noting that defendant's motion, which was, in effect, for reargument, was untimely because it was made more than 30 days after service upon the defendant of a copy of the order entered with notice of entry.); see also, *Dugas v. Bernstein*, 5 Misc. 3d 818; (NY County 2004) (instructing that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period....")

Plaintiff's failure to comply with this statutory requirement, is not necessarily fatal to his motion to reargue since there are exceptions. For example, "insofar as interlocutory orders are concerned, the statutory time limits are not controlling." *Bray v. Gluck*, 235 A.D.2d 72, 73 (3rd Dept. 1997). It is well established that "regardless of statutory time limits concerning motions to reargue every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986); *Aridas v. Caserta*, 41 N.Y.2d 1059, 1061 (1977); *General Electric Real Estate Equities, Inc. v. Bell Realty Management, Inc., et al.*, 291 A.D.2d 313, 314 (1st. Dept. 2002); *In the Matter of the Estate of M. Winifred Burns*, 228 A.D.2d 674, 675 (2nd Dept. 1996). "Another exception is that a motion for reargument may be brought after the time to appeal has expired if a notice of appeal

has been timely filed and the motion is brought prior to the submission of the appeal or at the latest before the appeal is determined, because at that point Supreme Court no longer has discretion to reconsider its order as it is then an order of the appellate court." *Bray*, 235 A.D.2d at 74; *Garcia v. Jesuits of Fordham, Inc.*, 6 A.D.3d 163, 165 (1st Dept. 2003); *Leist v. Goldstein*, 305 A.D.2d 468 (2nd Dept. 2003).

In the instant case, Plaintiff fits within the former exception and not the latter as the Court's October 7, 2009 Decision and Order only partially resolved the substantive issues between the parties since it left pending Plaintiff's common-law negligence claim. Therefore, the Court will grant Plaintiff's motion for leave to reargue, notwithstanding the fact that said motion was made after the statutory deadline had passed. See *Liss* 68 N.Y.2d at 20 (noting that every court retains continuing jurisdiction to reconsider its interlocutory order during the pendency of the action).

With respect to Plaintiff's motion to renew, Plaintiff has not identified for the Court the newly discovered evidence which existed at the time the prior motion was made nor has Plaintiff provided a justifiable excuse as to why the purportedly new evidence was not previously submitted as required by CPLR §2221(e)(3). Accordingly, Plaintiff's motion to renew will be denied.

i. Plaintiff's Labor Law §241(6)[1] Claim

[1] Labor Law §241(6) provides in pertinent part: All Contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the person employed therein

It is well established that Labor Law § 241(6) was enacted to impose a non-delegable duty upon contractors, owners and their agents to provide reasonable and adequate protection and safety for workers engaged in constructing, demolishing, or excavating. See, *Ross v. Curtis-Palmer Hydor-Electric Company et al.*, 81 N.Y.2d 494, 501 (1993); see, also, *Rizzuto v. Wenger*, 91 N.Y.2d 343, 348 (1998) (instructing that "Labor Law §241(6) by its very terms, imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed."); and *Jock v. Fien*, 80 N.Y.2d 965, 967 (1992) (noting that the protections of Labor Law §241(6) are limited to requiring contractors and owners to provide reasonable and adequate protection and safety specifically to employees working in, and persons lawfully frequenting, all areas in which construction, excavation or demolition work is being performed.)

The record here clearly shows that at the time of the accident, Plaintiff was not engaged in construction, excavation or demolition work. Plaintiff, a metal cleaner, was engaged in the act of cleaning a metal revolving door. Thus, he was not engaged in an activity protected under Labor Law §241(6). See, *Kim v. Herbert Construction Co.*, 275 A.D.2d 709, 710 (2nd Dept. 2000) (concluding that plaintiff did not fall within the class of persons protected by the statute as Labor Law §241(6) was designed to provide protection to workers engaged in renovation or construction work.) Accordingly, this Court did not overlook any facts or misapprehend the law

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or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith. McKinney's Consolidated Laws of New York Labor Law S241(6).

with respect to granting Defendants, 120 Broadway and Silverstein Properties' motions to dismiss Plaintiff's cause of action under Labor Law §241(6).

ii. Plaintiff's Labor Law §200[2] Claim

In contrast to §241(6), Labor Law §200 is not confined to construction, demolition, or excavation, but codifies the common-law duty of an owner or contractor to provide employees a safe place to work. However, implicit in this duty, under Labor Law §200, is the precondition that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. See, *Russin v. Louis N. Picciano & Son et al.*, 54 N.Y.2d 311, 317 (1981). As discussed *supra*, Defendant 120 Broadway, met its burden of establishing that it was entitled to summary judgment as a matter of law, by demonstrating that it did not exercise supervisory control over Plaintiff's work, and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition. However, the same cannot be said for Defendant, Silverstein Properties.

At the summary judgment phase of this case issues of fact remained with respect to Plaintiff's Labor Law §200 and common-law negligence causes of action insofar as asserted against Silverstein Properties. A review of the record shows that Silverstein Properties was in privity with Remco, Plaintiff's employer at the time of the accident, and therefore Silverstein Properties had the ability and the authority to control Plaintiff and the activity producing his injury. See *Russin*, 54 N.Y.2d at 317. It is undisputed that Silverstein Properties was contracted

[2] Labor Law §200 states in relevant part: All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section. McKinney's Consolidated Laws of New York Labor Law S200(1).

by 120 Broadway to be the managing agent of said premises and that pursuant to that agreement Silverstein Properties was authorized to contract the services of third party vendors to operate and maintain the property. (See, Silverstein Properties Mot. S.J. at ¶¶ 8-9) Carl Lettich, Silverstein Properties' employee and building manager for the 120 Broadway property testified in his examination before trial that his duties were to manage the day-to day operations of the building, which included inspecting the building for cleanliness and maintenance issues. (See, Silverstein Properties Mot. S.J. at ¶17.) The record also shows that Silverstein Properties' chief engineer, head of security, and assistant building manager were also tasked with the responsibility of inspecting the premises at 120 Broadway. Whether or not any of these authority figures had knowledge of the existing hazard and exercised control over Plaintiff's work is a question for the jury. Given the facts in dispute, Silverstein Properties was not entitled to summary judgment as a matter of law with respect to Plaintiffs Labor Law §200 and common-law negligence claims. Therefore, the Court's prior Order granting Silverstein Properties' Motion for Summary Judgment on Plaintiff's Labor Law § 200 claims as it applies to Silverstein Properties will be recalled and vacated.

iii. Plaintiff's Labor Law §240(1)[3] Claim

"Labor Law §240(1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injures proximately caused by that failure."

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[3] Labor Law §240(1) provides, in pertinent part: All contractors and owners and their agents, ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. McKinney's Consolidated Laws of New York Labor Law S240(1).

Jock v. Fien, 80 N.Y.2d 965, 967 (1992). However, not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in §240(1) and the failure to use, or the inadequacy of, a safety device of the kind identified in the statute. See, *Narducci v. Manhasset Bay Associates et al.*, 96 N.Y.2d 259, 267 (2001). Thus, for §240(1) to apply, a plaintiff must show more than an object falling causing him an injury during the course of employment. He must in addition show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of they type specified in the statute. *Id.* at 268. Furthermore, "the fact that an injured plaintiff may have been working at an elevation when the object fell is of no moment in a falling object case, because a different type of hazard is involved. *Id.*

In the case at bar, the bricks that fell from the ceiling were not items being hoisted or objects that required securing for the type of work being performed by Plaintiff. Under these undisputed facts, the lack of a hoisting or securing device of the type identified in the statute was not the cause of the bricks to fall on Plaintiff. While this was clearly a hazard of the workplace it was not one contemplated by Labor Law §240(1). "This was not a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected." *Roberts v. General Electric Company et al.*, 97 NY.2d 737 (2002). "The fact that gravity worked upon [the bricks] which caused plaintiff's injury is insufficient to support a section 240(1) claim." *Narducci*, 96 N.Y.2d at 270. Thus, the Court here did not overlook or misapprehend the law in granting Defendants summary judgment with respect to Plaintiff's cause of action under Law §240(1) as both 120 Broadway and Silverstein Properties were entitled to summary judgment on Plaintiff's Labor Law §240(1) claim.

II. Defendants' Contractual and Common Law Indemnification Claims

Upon a review of the record, the Court finds that no facts were overlooked nor was the law misapprehended with respect to Defendants' claims for contractual and common law indemnification. At the summary judgment phase of the litigation, 120 Broadway sought indemnification from Silverstein Properties and likewise Silverstein Properties sought to be indemnified by 120 Broadway. Each Defendant vigorously contested the roles they played in controlling or supervising Plaintiff's work and utilized their supposed lack of authority as a basis for claiming one was entitled to indemnification from the other. As a result, issues of fact remained regarding the question of indemnity and questions of fact are best reserved for a jury to decide. Accordingly, neither 120 Broadway nor Silverstein Properties were entitled to summary judgment, as a matter of law, on the issue of indemnification. "[B]ecause summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue." *Rotuba Extruders, Inc., v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *Herrin v. Airborne Freight Corp.*, 301 A.D.2d 500 (2d Dept. 2003); see also, *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979) (finding summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law.)

III. Conclusion

Pursuant to the aforementioned reasons, Plaintiff's Cross-Motion for an Order granting leave to Renew and/or Reargue the Court's Decision and Order dated October 7, 2009 is GRANTED.

Defendant/Third-Party Plaintiff, 120 Broadway's Motion for an Order pursuant to CPLR §2001 and CPLR 5019, to Resettle the Court's October 7, 2009 Decision/Order to include a decisional paragraph dismissing the Plaintiff's common law negligence claim as against Defendant 120 Broadway Holdings, LLC is DENIED;

Accordingly, it is hereby

ORDERED, that Plaintiff's Cross-Motion for an Order granting leave to Renew and/or Reargue the Court's Decision and Order dated October 7, 2009 is GRANTED, and it is further

ORDERED, that this Court's prior Order granting Defendant, Silverstein Properties Motion for Summary Judgment on Plaintiff's cause of action under Labor Law §§§ 200, 240(1), 241(6) is recalled and vacated, and it is further

ORDERED, that Defendant, Silverstein Properties Motion for Summary Judgment is GRANTED with respect to Plaintiff's causes of action under Labor Law §§240(1), 241(6), and it is further

ORDERED, that the portion of Defendant, Silverstein Properties' Motion for Summary Judgment on common-law and contractual indemnification claims as against 120 Broadway is hereby DENIED, and it is further

ORDERED, that Defendant/Third-Party Plaintiff, 120 Broadway Holdings, LLC's Motion for an Order to Resettle the Court's October 7, 2009 Decision/Order is DENIED, and it is further

ORDERED, that this Court's prior Order granting Defendant/Third-Party Plaintiff, 120 Broadway's Motion for Summary Judgment on Plaintiff's causes of action under Labor Law §§§

200, 240(1), 241(6) is recalled and vacated, and it is further

ORDERED, that Defendant/Third-Party Plaintiff, 120 Broadway's Motion for Summary Judgment on Plaintiff's causes of action under Labor Law §§§ 200, 240(1), 241(6) and common-law negligence is GRANTED and it is further

ORDERED, that the portion of Defendant/Third-Party Plaintiff, 120 Broadway's Motion for Summary Judgment on common-law and contractual indemnification claims as against Silverstein Properties is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: May 26, 2010

Hon. Mary Ann Brigantti-Hughes, J.S.C.